BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DOUGLAS D. KING Claimant VS. **SEALY CORPORATION** Respondent AND **ARCH INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,059,645

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 26, 2012, preliminary hearing Order entered by Special Administrative Law Judge Jerry R. Shelor. Keith L. Mark, of Mission, Kansas, appeared for claimant. John David Jurcyk, of Kansas City, Kansas, appeared for respondent.

The Special Administrative Law Judge (SALJ) ordered respondent to pay temporary total disability benefits to claimant from October 29, 2011, through December 31, 2011, and authorized Dr. Stephen Reintjes to be claimant's authorized treating physician for further treatment and referrals. In so ordering, the SALJ impliedly found that claimant sustained an accidental injury that arose out of and in the course of his employment and that he gave sufficient statutory notice of the injury.

The record on appeal is the same as that considered by the SALJ and consists of the transcript of the July 26, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent denies that claimant proved he met with personal injury by accident on October 19, 2011, the date alleged, denies that claimant's injury arose out of and in the

course of his employment, and denies that claimant gave respondent sufficient statutory notice of his alleged accidental injury.

Claimant asks that the SALJ's Order be affirmed, arguing that he sustained an accidental injury on October 19, 2012, that arose out of and in the course of his employment with respondent and that he gave timely and sufficient notice of said accidental injury.

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury that arose out of and in the course of his employment with respondent?

(2) Did claimant give respondent timely and sufficient notice of his work-related accidental injury?

FINDINGS OF FACT

Claimant began working as a truck driver for respondent on September 13, 2011. He was hired to drive an 18-wheeler tractor-trailer unit delivering mattresses, box springs and sometimes bed frames. Claimant did not load the truck. When he got to the delivery location, he would have to "tailgate" the mattresses, meaning he would get the mattresses in the trailer to the back end of the trailer.[1] After he would tailgate the mattresses, the customer would unload the mattresses from the trailer. Claimant said a mattress and box springs could weigh as much as 200 pounds, but he did not know the exact weight, saying it would depend on the type and size of the mattress.

On October 19, 2011, claimant was working his regular job. He traveled from Kansas City to St. Louis, Missouri, to deliver a load of mattresses. He delivered to nine customers that day and he was pulling a full load of mattresses. Claimant estimated that he had delivered about 110 to 120 mattresses and box springs that day. He would have been required to manually move the mattresses and box springs from their location in the trailer to the end of the truck, where the customer could unload them. Claimant had no mechanical devices to assist him on October 19, 2011. He had no pain or other symptoms on October 19.

After finishing his deliveries, claimant drove to Penske to drop off his trailer and check on whether the tractor he was to switch out was there. During that time, he was performing work for respondent. After that, because of United States Department of Transportation regulations, he was required to lay over in St. Louis. During that layover,

[1] P.H. Trans. at 12.

claimant was not paid by respondent, but respondent provided him with a motel room and paid for meals.

When claimant woke up on October 20, he had no grip in his right hand and felt pain shooting down his right arm that started at the base of his neck between his shoulder blades. Claimant had never felt symptoms like that in the past. From the time his work hours ended on October 19 and when he woke up the next morning with symptoms, claimant had not been involved in any other slips, falls or accidents or injuries of any kind.

After claimant woke up on October 20, 2011, he drove a tractor and empty trailer back to Kansas City. His symptoms did not decrease as the day progressed, and he called his friend, Dr. Michael Page, a chiropractor. When he returned to Kansas City that afternoon, he went straight to Dr. Page's office. He told a coworker about his symptoms but did not report an injury to respondent. He thought he had something out of place and that he would see a chiropractor and get back into shape.

When claimant saw Dr. Page on October 20, 2011, claimant reported what he had been doing the day before. Dr. Page performed an adjustment on claimant. Claimant said he got some relief from the adjustment, but not much. Dr. Page told claimant to return the next day, October 21, which claimant did. Dr. Page performed another adjustment, which had no affect on claimant's symptoms. Dr. Page then recommended that claimant see his personal doctor. Claimant saw Dr. Roman Enriquez either that day, October 21, or the next Monday, October 24. Claimant told Dr. Enriquez he thought his symptoms had something to do with his work at respondent. Dr. Enriquez referred claimant to Dr. Patrick Griffith, for a pain management consultation, and later to Dr. Stephen Reintjes, a neurosurgeon. Claimant was taken off work on October 29, 2011, although he did not say which doctor gave him the off-work slip.

Claimant thinks he reported his neck and right arm symptoms to respondent on either October 24 or 25, 2011. Claimant testified he told respondent he had something going on in his neck but was not sure how it had occurred. Claimant stated he did not know what specifically caused his symptoms; he just woke up on October 20th with pain in his neck going down his right arm. He said the only thing he figured could have happened would have been an injury at work on October 19, 2011. Claimant later stated he was not sure when he told respondent he was making a claim for a work injury but it would have been on or before November 1, 2011.

Claimant saw Dr. Griffith on November 1, 2011. His chief complaint was neck pain with radiation to the shoulder and down the arm to the small and ring fingers. Claimant reported that he had delivered mattresses on October 29, 2011,[2] and woke up the next morning with severe pain in his neck that radiated down his arm. Dr. Griffith reviewed the

[2] This could be a typographical error or claimant could have given Dr. Griffith the wrong date.

results of a MRI of claimant's cervical spine that had been taken October 25, 2011, which showed a disc herniation at C6-7 and disc bulging at C5-6. Dr. Griffith diagnosed claimant with herniated nucleus pulposus on the right at C6-7 with associated C-7 radiculopathy. Dr. Griffith noted in his report that claimant was going to file this as a workers compensation claim, which he described as "reasonable."[3]

Respondent sent claimant to OHS, on November 2, 2011, where he was seen by Dr. J. Ralph Payne. Claimant told Dr. Payne he had driven to St. Louis on October 19 and had delivered mattresses and the next morning, when he woke up, he had a stiff neck with pain and tingling down his right arm. After an examination, Dr. Payne opined that there was no incident, event or accident specific to the workplace that would have caused the symptoms. Dr. Payne said that in his opinion, the prevailing factor for claimant's current symptoms was preexisting diskogenic cervical disease.

Claimant was seen by Dr. Stephen Reintjes on November 23, 2011, after being referred by Dr. Enriquez. Claimant told Dr. Reintjes that he had been delivering mattresses for respondent and woke up in his hotel room and could not move his neck. Claimant also complained of numbness and tingling in his right index finger and great finger and severe pain down his right arm. Dr. Reintjes reviewed the MRI of claimant's cervical spine and performed a physical examination, after which he diagnosed claimant with right C6-7 disc herniation. He specifically related the disc herniation to claimant's work injury on October 19, 2011.

Claimant's attorney sent claimant to Dr. William Hopkins for an independent medical examination. Dr. Hopkins examined claimant on April 23, 2012. Claimant told Dr. Hopkins that he was in St. Louis, Missouri, on October 19, 2011. He said he had pops and snaps in his right arm and shoulders that day, which he did not pay any attention to, but that when he woke up the next day he had neck pain, pain in the right shoulder, and pain down his right arm. After reviewing claimant's medical records and performing a physical examination, Dr. Hopkins concluded that claimant sustained injuries to his cervical spine and right shoulder as a result of lifting activities at work on October 19, 2011. He stated further that the work activities October 19, 2011, were the prevailing factor for claimant's injury and subsequent treatment. Dr. Hopkins said that although any man of the age 54 would have some degenerative abnormalities, the changes are not necessarily symptomatic. He noted claimant was able to perform the reasonably strenuous work activity of lifting and delivering mattresses prior to his accident.

Claimant said he was released to return to work by Dr. Reintjes on December 31, 2011. He stated he still moves mattresses, but now he does so with his left arm and not his right, and he uses a mattress cart all the time. He still has a constant, stabbing pain

[3] P.H. Trans., Cl. Ex. 3 at 3.

in his neck and down his right arm. He has pain in his right elbow and on most days his right hand is at least half numb.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.
>
> (e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
>
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
>
> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
>
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
>
> In no case shall the date of accident be later than the last date worked.

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) ''Burden of proof'' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[5]

ANALYSIS

Claimant is alleging he suffered personal injuries to his neck, right shoulder and arm by an accident resulting from unloading mattresses on October 19, 2011.[6] Claimant is not alleging injury by repetitive trauma.

An "accident" is defined as "an undesigned, sudden and unexpected traumatic event . . . identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift."[7] The greater weight of the credible evidence in this case is that claimant first experienced symptoms of an injury on October 20, 2011, the morning after his October 19, 2011, work shift, when he awoke with the symptoms of pain in his neck, upper back and right arm and a lack of grip strength in his right hand. The first mention of claimant experiencing any symptoms on October 19, 2011, appears in Dr. Hopkins' notes of his examination of claimant on April 23, 2012, some six months after the alleged date of accident. Claimant reported to Dr. Hopkins that he felt some pops and snaps in his right arm and shoulders on October 19, 2011, but did not pay any attention to them. He did not consider them to be symptoms of an injury. Moreover, neither the earlier medical records nor the testimony indicates that claimant experienced any symptoms before October 20, 2011. At the July 26, 2012, preliminary hearing, claimant repeatedly denied having experienced any symptoms on the 19th of October, 2011.[8] Experiencing symptoms upon awakening the morning after the work shift ended does not constitute symptoms being produced "at the time" of the injury.[9]

---

[4] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[5] K.S.A. 2011 Supp. 44-555c(k).

[6] Form K-WC, E-1, Application for Hearing filed February 15, 2012; P.H. Trans. at 6.

[7] K.S.A. 2011 Supp. 44-508(d).

[8] P.H. Trans. at 23, 26, 32.

[9] *Johnson v. State*, Docket No. 1,060,601, 2012 WL 4763707 (Kan. WCAB Sept. 14, 2012).

CONCLUSION

Based on the record presented to date, claimant has failed to prove that he sustained an accident on October 19, 2011, as it is defined by statute.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Special Administrative Law Judge Jerry R. Shelor dated July 26, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
kmark@markandburkhead.com
llivengood@markandburkhead.com

John David Jurcyk, Attorney for Respondent and its Insurance Carrier
jjurcyk@mvplaw.com
mvpkc@mvplaw.com

Jerry R. Shelor, Special Administrative Law Judge
William Belden, Administrative Law Judge